

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD**

BRIGHTSIDE ACADEMY, INC.,

Employer

and

**DISTRICT COUNCIL 1707, AFSCME,
AFL-CIO,**

Petitioner

Cases 2-RC-204309

2-RC-204310

2-RC-204311

2-RC-204313

2-RC- 204314

2-RC-204316

2-RC- 204374

29-RC-204367

REQUEST FOR REVIEW OF THE DECISION AND DIRECTION OF ELECTIONS

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TABLE OF CONTENTS

PRELIMINARY STATEMENT	1
REASONS FOR GRANTING THE REQUEST FOR REVIEW.....	3
STATEMENT OF THE FACTS.....	6
ARGUMENT	12
POINT I: THE NLRB MUST GRANT REVIEW BECAUSE THE PROFESSIONAL EMPLOYEES ARE BEING DENIED THE OPPORTUNITY TO MAKE AN INFORMED CHOICE WHETHER TO BE INCLUDED WITH NON-PROFESSIONAL EMPLOYEES.....	12
POINT II: THE BOARD MUST GRANT REVIEW BECAUSE THE REGIONAL DIRECTOR DID NOT DETERMINE THE SCOPE OF THE UNITS AND THE APPROPRIATE UNITS.....	14
CONCLUSION.....	17

TABLE OF AUTHORITIES

CASES

Page(s)

<i>Hamilton Test Systems, New York, Inc., v. National Labor Relations Board</i> , 743 F.2d 136 (2 nd Cir. 1984).....	6, 16
<i>Pratt & Whitney</i> , 327 NLRB 1213 (1999).....	16
<i>Sonotone Corp</i> , 90 NLRB 1236 (1950).....	1, 12, 13
<i>Specialty Healthcare and Rehabilitation Center of Mobile</i> , 357 NLRB 934 (2013).....	14

OTHER

National Labor Relations Act, 29 U.S.C. § 159(b).....	13, 14
---	--------

PRELIMINARY STATEMENT

Brightside Academy, Inc. (“Brightside” or “Employer”) operates childcare and early education centers. District Council 1707, AFSCME, AFL-CIO filed petitions to represent employees at seven Brightside centers located in the Bronx and one located in Brooklyn. This case presents exigent circumstances warranting an expedited review by the National Labor Relations Board (“NLRB”), the granting of the request for review, and the reversal of the Regional Director’s Decision and Direction of Election (“DDE”). (Attached as Exhibit “A” is the DDE)

The Union and the Employer were unable to agree on the appropriate unit and the scope of the unit. (Transcript (“Tr.”) 17-31)¹ (The transcript pages cited herein are attached as Exhibit “B”) The Union sought to represent a unit which included lead teachers, assistant teachers, janitors, cooks, family advocates, office managers, and school age coordinators. Brightside stated that the family advocates, office managers, and school age coordinators were either managerial, supervisory and/or confidential employees and could not part of the unit. The parties did agree that the lead teachers were professional employees and, in order for the lead teachers to be included in a unit with the non-professional employees, there had to be a *Sonotone* election. *Sonotone Corp*, 90 NLRB 1236 (1950). (Tr. 17-31)

The Regional Director refused to allow the Employer to present evidence on whether the family advocates, office managers, and school age coordinators were part of the unit. (Tr. 83) Brightside was only allowed to give an offer of proof, including that these employees were part of a panel that hired employees. (Tr. 39, 40, 44, 83)

¹ Tr. Followed by a page number refers to the page number of the Transcript of the hearing held on August 25, 2017.

The Regional Director issued a DDE on September 1, 2017. In directing the election, the Regional Director found that the family advocates, office managers and school age coordinators would vote subject to challenge in the unit with non-professional employees. (Page 8 of the “DDE”)

This case presents novel and important issues. First, the lead teachers, who are professional employees, are being asked to vote whether to be included with employees who are not professionals. However, the vote is being directed even though it has not been determined which classifications of employees will be in the non-professional units because three job classifications are in dispute. The Employer asserts that the Regional Director, by leaving undetermined whether these three classifications are part of the units, has precluded the lead teachers from making an informed choice on whether to be part of a units with non-professional employees.

The second important issue is that, like the lead teachers, the employees in the units of non-professional employees also are being deprived of the opportunity to have an informed vote because of the dispute over whether the three job classifications are part of the units or not part of the units. Moreover, as indicated below, in six of the eight petitions, more than ten percent of the potential n the bargaining unit of the non-professional employees are voting subject to challenge.

The NLRB must grant “extraordinary relief” and grant an expedited consideration of this Request for Review, stay the election from proceeding, and/or impound the ballots. This relief clearly is necessary based upon the circumstances in this case to prevent an election in contradiction to many years of Board decisions. These decisions hold that employees must be provided with the opportunity to make an informed decision when they vote, particularly when professionals are deciding whether to vote to join a unit of non-professional employees.

REASONS FOR GRANTING THE REQUEST FOR REVIEW

A compelling reason exists for granting review because:

(1) The Regional Director's DDE raises a "substantial question of law or policy" because of its departure from Board precedent and/or the absence of Board law. (Section 102.67 (d) (1) of the Board's rules) The DDE is in contradiction to over sixty-five years of Board in how a *Sonotone* election must be conducted. Professionals must know what the classifications are in a unit of non-professional employees so that they may make an informed choice on whether to vote to be included in a unit with non-professional employees. At the very least, this case also raises a significant issue of the impact of the Board's new rules regarding how the Board will conduct a *Sonotone* election when there are issues in dispute over the classifications of employees who are in the non-professional units.²

In addition, the Regional Director has failed to follow the National Labor Relations Act's ("Act") mandate, as well as the Board's election rules, that the Regional Director must determine the scope and appropriateness of the units prior to an election when there is no agreement between the parties. At some locations, three classifications of employees are voting subject to challenge. The Regional Director has confused eligibility issues with the scope and appropriateness of a unit. As indicated below, even the NLRB's website highlight the Regional Director's error. This is not a case where the

² The Employer preserves its right to challenge the Board's implementation of new election rules. Brightside asserts that the rules are improper and unlawful.

Regional Director has the discretion, under the Board's elections rules, to allow an individual(s) to vote subject to challenge. For example, the election rules, would allow foremen working on a production line to vote subject to challenge on whether they are supervisors if the Regional Director directed an election in a production and maintenance unit or the parties agreed that the foremen would vote subject to challenge. However, in the case at bar the Regional Director did not find the classifications in dispute to be part of the units and the parties did not agree that these classifications would vote subject to challenge. Thus, the scope and appropriateness of the units are in dispute, not the eligibility of the employees to vote in a prescribed unit by the Regional Director or by an agreement between the union and the company. The DDE provides that the decision of whether the three disputed job categories will be included in the bargaining unit will be determined later. This puts the lead teachers and the non-professional employees, who part of the employees in the non-professional units, in the impossible situation to make an informed vote.

Further, more than ten percent of potential voters in six of the eight non-professional units will vote subject to challenge. This uncertainty requires that the scope and the appropriate units be determined prior to an election to allow the employees to have an informed vote on whether they wish to be included in the unit. The Regional Director's conclusion that this relatively small percentage which she stated could have been as much as 18% of the non-professional unit, "did not significantly change the size of character of

the unit and thus are not relevant to a question concerning representation,” misses the point. (Page 3 of the DDE) There are three classifications in dispute, resulting in a question about eligibility of up to almost of one out of six (or more) voters being subject to challenge in the units of non-professional employees.

(2) The Regional Director’s decisions on “substantial factual issue[s]” are “clearly erroneous on the record” and have “prejudicially” affected the employers. (Section 102.67 (d) (2) of the Board’s rules). As stated above Brightside should have been allowed to litigate the appropriateness of the unit. Moreover, the Hearing Officer allowed the hearing to continue well beyond the close of business on a Friday evening.

(3) The conduct of the hearing and the rulings made in the hearing were prejudicial to the Company. (Section 102.67 (d) (3) of the Board’s rules). The hearing officer, with the approval of the Regional Director, prohibited Brightside from disputing the scope and the appropriateness of the unit when she denied Brightside’s request to show that the three classifications in dispute should not be part of the unit which included assistant teachers, janitors, and cooks. The Hearing Officer also rushed through the hearing, not allowing the Employer to argue its position in detail or to confer with Brightside.

(4) The Regional Director’s DDE results in creating “compelling reasons” for the Board to reconsider the Board’s rules and policies. (Section 102.67 (d) of the Board’s rules) If the Regional Director is correct, employees

in both units (the lead teachers and non-lead teachers) will vote not knowing the scope and the appropriate units because they will not know whether literally up to fifty percent of the classifications in the non-professional units will eventually become part of or not become part of the non-professional units. This will deny employees the opportunity to make an informed choice when it comes to voting. *Hamilton Test Systems, New York, Inc., v. National Labor Relations Board*, 743 F.2d 136 (2nd Cir. 1984).

STATEMENT OF FACTS

The Union filed eight petitions on the same day. Seven in Region 2 and one in Region 29. The petitions were consolidated into one case in Region 2. Brightside objected to the consolidation of the units. (Tr. 16)

The following chart indicates the case number, the location for that respective case number, the employee classifications at the locations, and the classifications in dispute at that location.

Case number	Location	Number of Lead teachers	Number of Assistant Teachers	Cooks and Janitors and Number of each	Classifications in Dispute and Number in Each classification
2-RC-2043309	2901 White Plains Road, Bronx New York	11	16	1 Cook 1 Janitor	1 Family Advocate 1 Office Manager 1 School Age Coordinator
2-RC-204310	1093 Southern Boulevard, Bronx, NY	11	6	1 Cook 1 Janitor	1 Office Manager
2-RC-204311	1778 Southern Boulevard, Bronx, NY	8	8	1 Janitor	2 Family Advocates

2-RC-204313	770 St. Ann's Avenue, Bronx, New York	3	10	1 Cook 1 Janitor	1 Family Advocate 1 Office Manager
2-RC-204314	331 East 150 th Street, Bronx, NY	10	14	1 Cook 1 Janitor	1 Family Advocate 1 Office Manager 1 School Age Coordinator
2-RC-204316	2 Elliott Place, Bronx, NY	6	10	1 Janitor	1 Office Manager
2-RC-204734	1465 Webster Avenue, Bronx, NY	5	19	1 Janitor	1 Family Advocate 1 Office Manager
29-RC-204367	58 Belmont Avenue, Brooklyn, NY	6	12	1 Cook 1 Janitor	2 Family Advocates 1 School Age Coordinator

As the foregoing indicates, the Union and Brightside could not agree on the inclusion of the family advocates, office managers and school age coordinators. (Tr. 17-30) Brightside asserted that these employees were either managerial and/or supervisory. (Tr. 35-36) It further asserted that the office managers were confidential employees. (Tr. 45) The Employer also stated that these issues on whether these disputed classifications were part of the unit must be decided by the Regional Director prior to the election because these issues involve the scope of the unit, not just eligibility questions. (Tr. 47, 50)

At the hearing on August 25th, the Hearing Officer requested that Brightside provide an offer of proof why these employees in dispute should be excluded from the unit. (Tr. 38) The Employer stated that all the three classifications in dispute participate in the hiring process and are part of a hiring panel, making them supervisors/managerial employees. (Tr. 39-40, 44) The family advocate also is a managerial employee who is involved in determining how children are admitted to the facility. (Tr. 39-40, 45) The officer manager is a confidential employee because the office

manager has access to information that is used in making disciplinary and other decisions. (Tr. 45) The school age coordinators also supervise employees, including directing and assigning work. (Tr. 39-42) After receiving this offer of proof, the Hearing Officer refused to allow evidence on these issues, indicating that these employees would vote subject to challenge. (Tr. 46, 48)

The Hearing Officer continued the hearing until after 6:00 P.M. (Tr. 83) This resulted in a rush to complete the hearing, denying the Employer right to argue even its position completely and not allowing it time to review the issues with Employer representatives who are Orthodox Jews. (Tr. 83)

On September 1, 2017, at 7:41 P.M., the Friday before Labor Day and after the close of business in Region 2, Brightside was e-mailed a copy of the DDE by Region 2. The Regional Director directed an election, finding that each location constituted a separate bargaining unit. (Page 4 of the DDE). It was further stated by the Regional Director that there would be two voting units at each election. One unit, Voting Unit A, would consist of the lead teachers, who the parties stipulated were professional employees. (*Id.*) These employees would be given the opportunity to determine whether they wished to be included with the other employees in Voting Unit B. Voting Unit B would consist of the assistant teachers as well as cooks and janitors if they were employed at that location.

The Regional Director stated that “no decision has been made” on whether the family advocates, office managers, and school age coordinators should be part of Voting Unit B. (*Id.* at 6) The family advocates, office managers and school age coordinators are allowed to vote in Voting Unit B subject to challenge. The status of these employees, according to the Regional Director, would be resolved following the election. The Regional Director did not indicate how the status of these employees would be resolved.

The Regional Director directed an election as follows:

Case 02-RC-204309

Voting Unit A

INCLUDED: All full-time and part-time Lead Teachers employed by the Employer at 2901 White Plains Rd., Bronx, New York.

EXCLUDED: All other employees, including non-professional employees listed in Unit B, and office clerical employees, guards, and supervisors as defined in the Act.

Voting Unit B

INCLUDED: All full-time and regular part-time Assistant Teachers, Cooks and Janitors employed by the Employer at 2901 White Plains Rd., Bronx, New York.

EXCLUDED: All other employees, including professional employees listed in Unit A, office clerical employees, and guards, and other professional employees and supervisors, as defined in the Act.

Case 02-RC-204310

Voting Unit A

INCLUDED: All full-time and part-time Lead Teachers employed by the Employer at 1093 Southern Blvd., Bronx, New York.

EXCLUDED: All other employees, including non-professional employees listed in Unit B, office clerical employees, guards, and supervisors as defined in the Act.

Voting Unit B

INCLUDED: All full-time and regular part-time Assistant Teachers, Cooks, and Janitors employed by the Employer at 1093 Southern Blvd., Bronx, New York.

EXCLUDED: All other employees, including professional employees listed in Unit A, office clerical employees, and guards, and other professional employees and supervisors, as defined in the Act.

Case 02-RC-204311

Voting Unit A

INCLUDED: All full-time and part-time Lead Teachers employed by the Employer at 1778 Southern Blvd, Bronx, New York.

EXCLUDED: All other employees, including non-professional employees listed in Unit B, office clerical employees, guards, and supervisors as defined in the Act.

Voting Unit B

INCLUDED: All full-time and regular part-time Assistant Teachers and Janitors employed by the Employer at 1778 Southern Blvd, Bronx, New York

EXCLUDED: All other employees, including professional employees listed in Unit A, office clerical employees, and guards, and other professional employees and supervisors, as defined in the Act,

Case 02-RC-204313

Voting Unit A

INCLUDED: All full-time and part-time Lead Teachers employed by the Employer at 770 St. Ann's Ave., Bronx, New York.

EXCLUDED: All other employees, including non-professional employees listed in Unit B, office clerical employees, guards and supervisors as defined in the Act.

Voting Unit B

INCLUDED: All full-time and regular part-time Assistant Teachers, Cooks, and Janitors employed by the Employer at 770 St. Ann's Ave., Bronx, New York.

EXCLUDED: All other employees, including professional employees listed in Unit A, office clerical employees, and guards, and other professional employees and supervisors, as defined in the Act.

Case 02-RC-204314

Voting Unit A

INCLUDED: All full-time and part-time Lead Teachers employed by the Employer at 331 East 150th St., Bronx, New York., Bronx, New York.

EXCLUDED: All other employees, including non-professional employees listed in Unit B, office clerical employees, guards and supervisors as defined in the Act.

Voting Unit B

INCLUDED: All full-time and regular part-time Assistant Teachers, Cooks, and Janitors employed by the Employer at 331 East 150th St., Bronx, New York.

EXCLUDED: All other employees, including professional employees listed in Unit A, office clerical employees, and guards, and other professional employees and supervisors, as defined in the Act.

Case 02-RC-204316

Voting Unit A

INCLUDED: All full-time and part-time Lead Teachers employed by the Employer at 2 Elliott Place, Bronx, New York.

EXCLUDED: All other employees, including non-professional employees listed in Unit B, office clerical employees, guards and supervisors as defined in the Act.

Voting Unit B

INCLUDED: All full-time and regular part-time Assistant Teachers and Janitors employed by the Employer at 2 Elliott Place, Bronx, New York.

EXCLUDED: All other employees, including professional employees listed in Unit A, office clerical employees, and guards, and other professional employees and supervisors, as defined in the Act.

Case 02-RC-204374

Voting Unit A

INCLUDED: All full-time and part-time Lead Teachers employed by the Employer at 1465 Webster Ave., Bronx, New York.

EXCLUDED: All other employees, including non-professional employees listed in Unit B, office clerical employees, guards and supervisors as defined in the Act.

Voting Unit B

INCLUDED: All full-time and regular part-time Assistant Teachers and Janitors employed by the Employer at 1465 Webster Ave., Bronx, New York.

EXCLUDED: All other employees, including professional employees listed in Unit A, office clerical employees, and guards, and other professional employees and supervisors, as defined in the Act.

Case 29-RC-204367

Voting Unit A

INCLUDED: All full-time and regular part-time Lead Teachers employed by the Employer at 58 Belmont Ave., Brooklyn, New York.

EXCLUDED: All other employees, including non-professional employees listed in Unit B, office clerical employees, guards and supervisors as defined in the Act.

Voting Unit B

INCLUDED: All full-time and regular part-time Assistant Teachers, Cooks, and Janitors employed by the Employer at 58 Belmont Ave., Brooklyn, New York.

EXCLUDED: All other employees, including professional employees listed in Unit A, office clerical employees, and guards, and other professional employees and supervisors, as defined in the Act.

ARGUMENT

POINT I: THE NLRB MUST GRANT REVIEW BECAUSE THE PROFESSIONAL EMPLOYEES ARE BEING DENIED THE OPPORTUNITY TO MAKE AN INFORMED CHOICE WHETHER TO BE INCLUDED WITH NON-PROFESSIONAL EMPLOYEES

In 1950, the NLRB in *Sonotone* held that professional employees must be granted the opportunity to determine whether they wish to be included with non-professional employees. The Regional Director's decision to allow this election to proceed when the lead teachers do not know whether office managers, family advocates and school-aged coordinators will be included in the bargaining unit contradicts the NLRB's decision in *Sonotone*.

Section 9(b)(1) of the Act, 29 U.S.C. § 159(b)(1) prohibits the NLRB from including professionals with non-professional employees unless a majority of the professional employees vote to be included in a unit with non-professional employees. “Accordingly, [the NLRB] must ascertain the desires of the professional employees as to inclusion in a unit with nonprofessional employees.” *Sonotone*, 90 NLRB at 1241.

In the case at bar, the Regional Director’s decision to vote three classifications (family advocates, office managers, and school age coordinators) subject to challenge deprives the National Labor Relations Board of the opportunity to “ascertain the desires” of the lead teachers to be included with non-professional employees. *Id.* Lead teachers cannot make an informed decision when the lead teachers do not even know which classifications of employees are in the non-professional bargaining units. Illustrative of this lack of opportunity is that at three of the locations (2901 White Plains Road, 2 Elliott Place, and 331 East 150th Street) there are as many classifications in Voting Unit B (assistant teachers, etc.) as there are classifications (family advocates, etc.) subject to challenge. Maybe the lead teachers do not want some or all of these classifications to be in a bargaining unit? Maybe they would not vote to be included or would vote to be included in the unit if a determination had been made whether these classifications should be part of the unit prior to the election. Thus, the issue is not just whether these employees may be supervisors, managers or confidential employees; the issue is whether these classifications belong in the unit and whether the lead teachers would want these employees in the unit.

The Regional Director’s failure to ascertain whether these classifications are in the units prior to election requires the NLRB to grant review. The Regional Director must be directed to conduct a hearing to determine whether these employees should be in Voting Unit B.

POINT II: THE BOARD MUST GRANT REVIEW BECAUSE THE REGIONAL DIRECTOR DID NOT DETERMINE THE SCOPE OF THE UNITS AND THE APPROPRIATE UNITS

Section 9(b) of the Act, 29 U.S.C. 159(b) and the NLRB's new election rules mandate that the NLRB determine an appropriate unit. The Regional Director's job is to determine the appropriate unit. *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB 934 (2013). The Regional Director failed to determine the appropriate unit.

The NLRB's website under frequently asked questions, www.nlr.gov/resources/faq/2015-representation-case-procedures, illustrates the difference, under the NLRB's new election rules, between having employees vote subject to challenge when the overall unit is agreed to by the parties and when employees should not vote subject to challenge because there is a dispute between the parties over whether their classifications should be included in the unit. The NLRB's website provides as follows:

What are the kind of individual eligibility or inclusion questions that need not be litigated at a pre-election hearing:

Generally, individual eligibility and inclusion issues concern: (1) whether individuals or groups of individuals, otherwise falling **within the terms used to describe an appropriate unit**, are nevertheless ineligible because they are excluded from the Act's definition of "employee," and (2) whether individuals or groups of individuals fall **within the terms used to describe the unit**. For example, if the petition calls for a unit including "production and maintenance employees" and excluding "professional employees, guards and supervisors as defined in the Act," then the following would all be eligibility or inclusion questions: (1) whether production foremen are supervisors; (2) whether production employee Jane Doe is a supervisor; (3) whether workers who perform quality control functions are production employees; and (4) whether Joe Smith is a production employee. Other issues that may be deferred include managerial status and whether individuals are employed by their parent or spouse. [emphasis added]

In the case at bar, the family advocates, officer manager, and school age coordinator are not within the terms of the described unit. The described unit (Voting Unit B) only consists of specific

classifications, that is, assistant teachers and maybe janitors and cooks, depending on the location. This also is not a case where the parties agreed to vote these classifications subject to challenge. *Odwalla, Inc.*, 357 NLRB 1608 (NLRB). Brightside and the Union could not agree upon whether these employees are part of the units. Thus, this is a case where the three disputed classifications are not part of Voting Unit B in which the Regional Director directed an election or part of any agreement by the parties to vote these classifications in Voting Unit B subject to challenge. Stated differently, this case does not concern a question of the eligibility to vote in a prescribed or agreed upon unit; this case concerns a question of what classifications are in an appropriate unit.

In contrast to a dispute over eligibility in a directed or an agreed upon unit, the website provides what the Regional Director must do when there is an issue involving the scope and appropriateness of the unit:

What issues will be typically litigated in a pre-election hearing:

The final rule limits pre-election hearings to those issues that are relevant to a question concerning representation and makes clear that regional directors may exercise their discretion not to litigate disputes concerning individuals' eligibility to vote or inclusion in an appropriate unit at a pre-election hearing. The rule also explains that a party will have the right to introduce evidence of significant facts that support the party's contentions and are relevant to the existence of a question of representation. Issues involving jurisdiction, labor organization status, **the scope and appropriateness of the unit**, expanding and contracting units, and bars to an election are all relevant to the existence of a question of representation and so must be decided by the regional director if they are contested. Accordingly, those issues may be litigated in pre-election hearings if the parties place them in dispute and are able to point to facts that are legally significant to support their position on the contested issues. [emphasis added]

The case at bar clearly involves a dispute over the scope and the appropriateness of the units. The parties have only agreed upon three classifications in Voting Unit B. They have not agreed upon whether the three classifications of employees in dispute

should be part of Voting Unit B. Thus, the scope and the appropriateness in Voting Unit B have not yet been determined.

Further, the assistant teachers, cooks and janitors, in order to make an informed decision on how to vote, must know whether the disputed classifications are in the unit or not. Said employees are being deprived of the opportunity to make such an informed choice by having these classifications in dispute.

In addition, the character of the unit will change (through an unspecified procedure) if some or all of the disputed classifications are ultimately found to be part of Voting Unit B after the election. This will result in a significant alteration of Voting Unit B, warranting a new election if the unit is changed after the election. *Pratt & Whitney*, 327 NLRB 1213 (1999); *Hamilton Test Systems v. NLRB*.

Even if these classifications could vote subject to challenge, the NLRB should not allow an election in which more than ten percent of potential voters in six of the eight locations in Voting Unit B will vote subject to challenge. Only in 2 Elliot Place and 1465 Webster Avenue would there be less than ten percent of the potential voters not voting subject to challenge. The Regional Director seeks, in part, to diminish the actual percentage of potential voters, who will vote subject to challenge, by stating what the overall percentage of challenged voters will be in the combined units of professional and non-professional employees. (Page 3 of the DDE) However, these numbers assume that the professionals will vote to be included in the non-professional unit.

The large number of voters subject to challenge creates uncertainty as to the outcome of election, delaying the whole process. It just adds to the overall uncertainty in the election process, including creating issues on whether the employees will have an

opportunity to make an informed decision.

In sum, the NLRB must grant review and determine the scope and appropriateness in accordance with the NLRB's obligation under Section 9(b) to determine the appropriate unit and the NLRB's rules and regulations.

CONCLUSION

The Board must grant review and require the Regional Director to determine the scope and the appropriateness of the unit.

Dated: September 13, 2017

Respectfully submitted,
/s/ Stuart Weinberger
Stuart Weinberger
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New York, New York 10017

Declaration of Service

Stuart Weinberger declares pursuant to 28 U.S.C. Section § 1746:

That on September 15, 2017, I served the Request for Review by e-filing the request with the National Labor Relations Board and by serving by e-mail

(a) District Council 1707, AFSCME, AFL-CIO by serving its attorney, Thomas Murray, Esq. at TMurray@kjmlabor.com.

(b) Ms. Kathy King, Regional Director, Region 29, at kathy.drew-king@nlrb.gov.

(c) Mr. Nicholas Lewis, acting Regional Director, Region 2, at nicholas.lewis@nlrb.gov.

(d) Stephen Berger, Board Agent, Region 2 at stephen.berger@nlrb.gov

I declare under the penalty of perjury that the foregoing is true and correct. Executed on the 15th day of September, 2017.

/s/ Stuart Weinberger
Stuart Weinberger

Exhibit “A”

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2**

BRIGHTSIDE ACADEMY, INC.,¹

Employer

and

DISTRICT COUNCIL 1707, AFSCME, AFL-CIO²

Petitioner

**Cases 02-RC-204309
02-RC-204310
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02-RC-204374
29-RC-204367**

DECISION AND DIRECTION OF ELECTIONS

Petitioner seeks to represent eight units of employees at eight schools run by the Employer in the boroughs of the Bronx and Brooklyn in New York City.³ The Employer contends that three of the positions sought in the positions should not be included in any bargaining unit. Specifically, the Employer contends that Office Managers should be excluded because they are managerial employees and/or confidential employees, that Family Advocates should be excluded as supervisory and/or managerial employees, and that School-Age Coordinators should be excluded because they are supervisory employees.

Because I conclude that the units sought by Petitioner are appropriate for collective bargaining and that a question of representation exists under Section 9(c) of the Act, I am directing elections in these cases. Moreover, because the Employer's contentions concern whether certain individuals should be excluded from the units and therefore concerns their eligibility to vote, I further conclude that the Employer's contentions need not be litigated or resolved before the election is conducted because the resolution of the issue would not significantly change the size or character of the unit.

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board. Upon the entire record in this proceeding, I find:

¹ The name of the Employer appears as amended at hearing.

² The name of the Petitioner appears as amended at hearing.

³ The Petitions sought units at each location including Lead Teachers, Teacher Assistants, Teachers' Aides, Office Managers, School-Age Coordinators, Cooks, Janitors, Family Advocates, Family Workers, and Drivers. At the hearing, the parties reached stipulations regarding particular subsets of these classifications working at each location, which are reflected in the voting units I describe below, and I am directing that the three disputed classifications will vote subject to challenge. These are the only classifications at issue.

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.⁴
3. The labor organization involved claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

Pursuant to Section 102.63(b)(1) of the Board's Rules and Regulations, prior to the hearing in this matter, the Employer submitted a Statement of Position. The Employer's Statement of Position reveals that the Employer purportedly contests the appropriateness of the unit sought by Petitioner. However, a careful review of the Employer's Statement of Position reveals that, as noted above, the Employer is contesting the eligibility of certain employees to vote, or the inclusion of certain employees in the unit. In this regard, the Employer contends that: Office Managers should be excluded because they are managerial employees and/or confidential employees; Family Advocates should be excluded as supervisory and/or managerial employees; and, School-Age Coordinators should be excluded because they are supervisory employees.

In view of the fact that the Employer has not contested that the unit sought by Petitioner is appropriate for collective bargaining, I conclude that the Employer's Statement of Position establishes that the Employer is disputing the inclusion of certain individuals in the unit, and therefore is contesting the eligibility of certain individuals to vote. After consulting with and

⁴ For each case, the parties stipulated that the Employer is engaged in commerce within the meaning of the NLRA and subject to the jurisdiction of the NLRB. The parties further stipulated that the Employer has places of business at the locations shown below, corresponding to the listed case numbers, and that at each location, the Employer is engaged in the operation of a childcare and early education center. Annually, in the course and conduct of its business operations, the Employer derives gross income in excess of \$250,000 and purchases and receives products and supplies valued in excess of \$5,000 directly from firms located outside of the State of New York.

02-RC-204309: 2902 White Plains Rd., Bronx, New York
02-RC-204310: 1093 Southern Blvd, Bronx, New York
02-RC-204311: 1778 Southern Blvd, Bronx, New York
02-RC-204313: 770 St. Ann's Ave., Bronx, New York
02-RC-204314: 331 East 150th St., Bronx, New York
02-RC-204316: 2 Elliott Place, Bronx, New York
02-RC-204374: 1465 Webster Ave., Bronx, New York
29-RC-204367: 58 Belmont Ave., Brooklyn, New York

pursuant to instructions from the Acting Regional Director, the Hearing Officer provided the Employer with an opportunity to further explain its position on the record. The Employer's explanation on the record makes clear that it is raising eligibility issues implicating a small number of individuals compared to the number of employees whom the parties agree are in the units. The specific numbers pertaining to each unit are shown below.

Case	Location	Number of employees parties agree would be in a combined unit	Number of employees parties agree would be in a non-professional unit	Number of employees in dispute
02-RC-204309	2901 White Plains Rd., Bronx, NY	29	18	3
02-RC-204310	1093 Southern Blvd., Bronx, NY	18	8	2
02-RC-204311	1778 Southern Blvd., Bronx, NY	21	12	2
02-RC-204313	770 St. Ann's Ave., Bronx, NY	15	12	2
02-RC-204314	331 East 150 th St., Bronx, NY	26	16	3
02-RC-204316	2 Elliott Place, Bronx, NY	17	11	1
02-RC-204374	1465 Webster Ave., Bronx, NY	25	20	2
29-RC-204367	58 Belmont Ave., Brooklyn, NY	20	14	3

The Employer's Statement of Position raises eligibility issues which affect each unit at issue to different degrees. In the units with the highest percentage of contested employees (58 Belmont Ave., Brooklyn; Case No. 29-RC-204367), the contested employees would make up only 13 percent of a combined professional and non-professional unit, or 18 percent of a non-professional unit. Thus, I conclude that the Employer's contentions do not significantly change the size or character of the unit and thus are not relevant to a question concerning representation. Therefore, I instructed the Hearing Officer to not allow the parties to present evidence, as I concluded that it was unnecessary to resolve the eligibility issues before the election is conducted.

Therefore, consistent with Section 102.64 of the Board's Rules and Regulations, I direct an election in this matter, and I further order that the individuals in those classifications may vote in the election but their ballots shall be challenged since their eligibility has not been resolved.

The eligibility or inclusion of these individuals will be resolved, if necessary, following the election.

Under Section 9(b)(1) of the Act, the Board is prohibited from including professional employees in a unit with employees who are not professional, unless a majority of the professional employees vote for inclusion in such a unit. To carry out the statutory requirement, the Board has adopted a special type of self-determination procedure in such an election known as a *Sonotone* election. Under this procedure, separate voting groups encompassing all professionals at each location would elect whether to constitute separate appropriate bargaining units or be included in larger units with non-professionals. I find that all professional employees⁵ herein constitute separate voting groups which, depending on the outcome of the elections, may constitute either separate appropriate bargaining units, or be included in units with the non-professional employees.

In view of the foregoing and the record as a whole, I find that the following employees⁶ may constitute appropriate units in each of the cases for the purposes of collective bargaining:

All full-time and part-time Lead Teachers, Assistant Teachers, Cooks, and Janitors, employed by the Employer at the locations in each petition, excluding all other employees, office clerical employees, guards, and supervisors, as defined in the Act.

In order to ascertain the desires of the professional employees, I shall direct separate elections in the following groups:

Case 02-RC-204309

Voting Unit A

INCLUDED: All full-time and part-time Lead Teachers employed by the Employer at 2901 White Plains Rd., Bronx, New York.

EXCLUDED: All other employees, including non-professional employees listed in Unit B, and office clerical employees, guards, and supervisors as defined in the Act.

Voting Unit B

⁵ The parties stipulated to the status of Lead Teachers as professional employees. The parties further stipulated that Assistant Teachers, Cooks, and Janitors are non-professional employees. On the record, the parties agreed that the appropriate professional unit consisted solely of Lead Teachers. The Union asserted that the employees in the disputed classifications should properly be included in the non-professional units and the Employer asserted they should be excluded from that unit based on their status as supervisory, managerial, and/or confidential employees. Thus, I conclude that the employees in the disputed categories, who will vote subject to challenge, will vote in the non-professional "Voting Unit B" at each location.

⁶ Some of the locations do not have employees in each of these classifications, per the units detailed below.

INCLUDED: All full-time and regular part-time Assistant Teachers, Cooks and Janitors employed by the Employer at 2901 White Plains Rd., Bronx, New York.

EXCLUDED: All other employees, including professional employees listed in Unit A, office clerical employees, and guards, and other professional employees and supervisors, as defined in the Act.

Case 02-RC-204310

Voting Unit A

INCLUDED: All full-time and part-time Lead Teachers employed by the Employer at 1093 Southern Blvd., Bronx, New York.

EXCLUDED: All other employees, including non-professional employees listed in Unit B, office clerical employees, guards, and supervisors as defined in the Act.

Voting Unit B

INCLUDED: All full-time and regular part-time Assistant Teachers, Cooks, and Janitors employed by the Employer at 1093 Southern Blvd., Bronx, New York.

EXCLUDED: All other employees, including professional employees listed in Unit A, office clerical employees, and guards, and other professional employees and supervisors, as defined in the Act.

Case 02-RC-204311

Voting Unit A

INCLUDED: All full-time and part-time Lead Teachers employed by the Employer at 1778 Southern Blvd, Bronx, New York.

EXCLUDED: All other employees, including non-professional employees listed in Unit B, office clerical employees, guards, and supervisors as defined in the Act.

Voting Unit B

INCLUDED: All full-time and regular part-time Assistant Teachers and Janitors employed by the Employer at 1778 Southern Blvd, Bronx, New York.

EXCLUDED: All other employees, including professional employees listed in Unit A, office clerical employees, and guards, and other professional employees and supervisors, as defined in the Act.

Case 02-RC-204313

Voting Unit A

INCLUDED: All full-time and part-time Lead Teachers employed by the Employer at 770 St. Ann's Ave., Bronx, New York.

EXCLUDED: All other employees, including non-professional employees listed in Unit B, office clerical employees, guards and supervisors as defined in the Act.

Voting Unit B

INCLUDED: All full-time and regular part-time Assistant Teachers, Cooks, and Janitors employed by the Employer at 770 St. Ann's Ave., Bronx, New York.

EXCLUDED: All other employees, including professional employees listed in Unit A, office clerical employees, and guards, and other professional employees and supervisors, as defined in the Act.

Case 02-RC-204314

Voting Unit A

INCLUDED: All full-time and part-time Lead Teachers employed by the Employer at 331 East 150th St., Bronx, New York., Bronx, New York.

EXCLUDED: All other employees, including non-professional employees listed in Unit B, office clerical employees, guards and supervisors as defined in the Act.

Voting Unit B

INCLUDED: All full-time and regular part-time Assistant Teachers, Cooks, and Janitors employed by the Employer at 331 East 150th St., Bronx, New York.

EXCLUDED: All other employees, including professional employees listed in Unit A, office clerical employees, and guards, and other professional employees and supervisors, as defined in the Act.

Case 02-RC-204316

Voting Unit A

INCLUDED: All full-time and part-time Lead Teachers employed by the Employer at 2 Elliott Place, Bronx, New York.

EXCLUDED: All other employees, including non-professional employees listed in Unit B, office clerical employees, guards and supervisors as defined in the Act.

Voting Unit B

INCLUDED: All full-time and regular part-time Assistant Teachers and Janitors employed by the Employer at 2 Elliott Place, Bronx, New York.

EXCLUDED: All other employees, including professional employees listed in Unit A, office clerical employees, and guards, and other professional employees and supervisors, as defined in the Act.

Case 02-RC-204374

Voting Unit A

INCLUDED: All full-time and part-time Lead Teachers employed by the Employer at 1465 Webster Ave., Bronx, New York.

EXCLUDED: All other employees, including non-professional employees listed in Unit B, office clerical employees, guards and supervisors as defined in the Act.

Voting Unit B

INCLUDED: All full-time and regular part-time Assistant Teachers and Janitors employed by the Employer at 1465 Webster Ave., Bronx, New York.

EXCLUDED: All other employees, including professional employees listed in Unit A, office clerical employees, and guards, and other professional employees and supervisors, as defined in the Act.

Case 29-RC-204367

Voting Unit A

INCLUDED: All full-time and regular part-time Lead Teachers employed by the Employer at 58 Belmont Ave., Brooklyn, New York.

EXCLUDED: All other employees, including non-professional employees listed in Unit B, office clerical employees, guards and supervisors as defined in the Act.

Voting Unit B

INCLUDED: All full-time and regular part-time Assistant Teachers, Cooks, and Janitors employed by the Employer at 58 Belmont Ave., Brooklyn, New York.

EXCLUDED: All other employees, including professional employees listed in Unit A, office clerical employees, and guards, and other professional employees and supervisors, as defined in the Act.

OTHERS PERMITTED TO VOTE: At this time, no decision has been made regarding whether Office Managers, School-Age Coordinators, or Family Advocates are included in, or excluded from, the non-professional bargaining units at each location. Thus, individuals in those classifications may vote in the election but their ballots shall be challenged since their eligibility has not been resolved. The eligibility or inclusion of these individuals will be resolved, if necessary, following the election.

In each case, the employees in the professional group (voting unit A) will be asked two questions on their ballots;

- (1) Do you wish to be represented in a unit that includes non-professional employees for the purposes of collective bargaining?
- (2) Do you desire to be represented for the purposes of collective bargaining by District Council 1707, AFSCME, AFL-CIO?

If a majority of the Lead Teachers in voting group (A) in any instance vote "yes" to the first question, indicating their wish to be included in the unit with the employees in voting group (B), they will be so included. Their votes on the second question will then be counted together with the votes of the employees in voting group B to determine whether or not the employees in the combined professional and non-professional unit wish to be represented by District Council 1707, AFSCME, AFL-CIO.

The employees in each case in voting group (B) will be polled to determine whether or not they wish to be represented by District Council 1707, AFSCME, AFL-CIO.

The unit determination is based, in part, on the results of the election among the professional employees. However, the following findings in regard to the appropriate unit are now made:

- (1) If, in any case herein, a majority of the Lead Teachers vote for inclusion in the unit with the employees in Voting Group B for that case, I find that a combined unit of those in Voting Group A and Voting Group B at that location will constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.
- (2) If, in any case herein, a majority of the Lead Teachers do not vote for inclusion in the unit with the employees in Voting Group B in that case, I find that Voting Group A and Voting Group B at that location will constitute separate units appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

DIRECTION OF ELECTIONS

The National Labor Relations Board will conduct secret ballot elections among the employees in the units found appropriate above. As described in greater detail above, employees will vote whether or not they wish to be represented for purposes of collective bargaining by DISTRICT COUNCIL 1707, AFSCME, AFL-CIO.

A. Election Details

The elections will be held in the Employer's facilities according to the following schedule:

Case	Date	Time	Location
02-RC-204316	9/19/17	12:30pm – 1:30pm	The family reception room at 2 Elliott Place, Bronx, NY
02-RC-204374	9/19/17	12:30pm – 1:30pm	Room 1 at 1465 Webster Ave., Bronx, NY
29-RC-204367	9/19/17	12:30pm – 1:30pm	Room 10 at 58 Belmont Ave., Brooklyn, NY
02-RC-204310	9/26/17	12:30pm – 1:30pm	Room 8 at 1093 Southern Blvd, Bronx, NY
02-RC-204311	9/26/17	12:30pm – 1:30pm	The basement conference room at 1778 Southern Blvd, Bronx, NY
02-RC-204313	9/26/17	12:30pm – 1:30pm	The family reception room at 770 St. Ann's Ave., Bronx, NY
02-RC-204314	9/27/17	12:30pm – 1:30pm	The 8AB basement room at 331 East 150 th St., Bronx, NY
02-RC-204309	9/27/17	12:30pm – 1:30pm	Room 13 at 2901 White Plains Rd., Bronx, NY

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending **August 19, 2017**, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Also eligible to vote using the Board's challenged ballot procedure are those individuals employed in the classifications whose eligibility remains unresolved as specified above and in the Notice of Election.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters. The Employer must also include in a separate section of that list the same information for those individuals who, according to this direction of election, will be permitted to vote subject to challenge.

To be timely filed and served, the list must be *received* by the Regional Director and the parties by **September 6, 2017**. The list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the

NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

Dated: September 1, 2017

A handwritten signature in cursive script, reading "Kathy Drew King", is written over a horizontal line.

KATHY DREW KING
ACTING REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 02
26 Federal Plaza, Suite 3614
New York, NY 10278-3699

Exhibit “B”

1 professional unit, any full time and part time lead teachers
2 employed by the employer at its facility located at 2901 White
3 Plains Road Bronx, New York and exclude all other employees,
4 including non-professional employees listed in the non-
5 professional unit and office clerical employees, and guards and
6 supervisors, as defined in the Act? Does the Employer
7 stipulate?

8 MR. WEINBERGER: Okay. At this point we will. I think
9 you have -- yes --

10 HEARING OFFICER KURTZLEBEN: This is to a part -- this is
11 that any unit found to be appropriate will include these, but
12 it's not saying this is exhaustively the unit. It's a partial
13 -- a stipulation to a partial unit at this point.

14 MR. WEINBERGER: Okay.

15 HEARING OFFICER KURTZLEBEN: Okay. And for the Union?

16 MR. MURRAY: Yes.

17 HEARING OFFICER KURTZLEBEN: Okay. And then for non-
18 professional employees in this unit, can it be stipulated that
19 any unit found appropriate by the Regional Director should
20 include all full time and regular part time assistant teachers,
21 cooks and janitors employed by the Employer at its facility
22 located at 2901 White Plains Road, Bronx, New York and should
23 exclude all other employees, including professional employees,
24 office clerical employees, and guards, and other professional
25 employees and supervisors, as defined in the Act? Does the

1 Employer stipulate?

2 MR. WEINBERGER: Yes.

3 HEARING OFFICER KURTZLEBEN: Okay. Does the Union
4 stipulate?

5 MR. MURRAY: Yes.

6 HEARING OFFICER KURTZLEBEN: Okay.

7 MR. MURRAY: I'm sorry, yeah, except -- those are the
8 inclusions. Except for the office manager, school age and
9 family advocate, which should also be included.

10 MR. WEINBERGER: Can we go off the record for one second?
11 I don't want --

12 HEARING OFFICER KURTZLEBEN: Off the record.

13 (Whereupon, a brief recess was taken)

14 HEARING OFFICER KURTZLEBEN: On the record.

15 All right. So can it be stipulated that any unit found
16 appropriate by the Regional Director should include all full
17 time and regular part time assistant teachers, cooks and
18 janitors employed by the Employer at its facility located at
19 2901 White Plains Road, Bronx, New York and exclude all other
20 employees, including professional employee listed in the
21 professional unit, and office clerical employees, and guards,
22 and other professional employees and supervisors, as defined in
23 the Act? Does the Employer stipulate?

24 MR. WEINBERGER: Yes, the Employer would stipulate to
25 that.

1 HEARING OFFICER KURTZLEBEN: And does the Union stipulate?

2 MR. MURRAY: The Union would stipulate to the included
3 classifications, but does not stipulate that office managers,
4 school age coordinators and family advocates should be
5 excluded.

6 HEARING OFFICER KURTZLEBEN: Okay. And do the parties
7 stipulate that this election should be held as a Sonotone
8 election? For the Employer --

9 MR. WEINBERGER: Yes, for the Employer.

10 MR. MURRAY: Yes.

11 HEARING OFFICER KURTZLEBEN: So we're going to go onto
12 case 02-RC-204310. Okay. And can it be stipulated that this -
13 - these -- the election should be held as a Sonotone election
14 with the units -- any unit found appropriate by the Regional
15 Director, including in voting group A, the professional unit,
16 all full time and part time lead teachers employed by the
17 Employer at its facility located at 1093 Southern Boulevard,
18 Bronx, New York and excludes all other employees, including
19 non-professional employees listed in the following list, unit
20 B, office clerical employees, and guards and supervisors, as
21 defined in the Act? And for voting group unit B, non-
22 professional unit, to include all full time and regular part
23 time assistant teachers, cooks and janitors employed by the
24 Employer at its facility located at 1093 Southern Boulevard,
25 Bronx, New York and to exclude all other employees, including

1 professional employees listed in unit A, the professional unit,
2 and office clerical employees, and guards, and other
3 professional employees and supervisors, as a defined in the
4 Act. Does the Employer stipulate?

5 MR. WEINBERGER: The Employer would stipulate with one
6 caveat the way you're phrasing it. It's not unit found to be
7 appropriate. This is what we would stipulate would be the unit
8 found to be appropriate. I think you're phrasing it wrong and
9 we object to that phrasing. We're not going to stipulate if
10 that's the phrasing.

11 HEARING OFFICER KURTZLEBEN: So what I understood is that
12 there is some dispute still about some classifications being
13 put in the unit. And this is just phrasing it as --

14 MR. WEINBERGER: Go ahead.

15 HEARING OFFICER KURTZLEBEN: -- any unit the Regional
16 Director determined would include at least these
17 classifications included and excluded.

18 MR. WEINBERGER: Well, I would just qualify it by saying
19 the issues in the unit found to be appropriate in unit B, we're
20 not saying the -- everybody is -- the Union and the Employer
21 are agreeing that the unit A is an appropriate unit. So you're
22 phrasing it like both units could be determined to be
23 different. It's really unit B that's the issue here.

24 HEARING OFFICER KURTZLEBEN: Okay. So let me rephrase the
25 stipulation. So can it be stipulated that the bargaining unit

1 that includes -- for professional unit A professional
2 employees, includes all full time and part time lead teachers
3 employed by the Employer at its facility located at 1093
4 Southern Boulevard, Bronx, New York and excludes all other
5 employees, including non-professional employees listed in unit
6 B, office clerical employees, and guards and supervisors, as
7 defined by the Act?

8 MR. WEINBERGER: Yes, the Employer could stipulate to
9 that.

10 HEARING OFFICER KURTZLEBEN: Okay. And does the Union
11 stipulate to that?

12 MR. MURRAY: Yes.

13 HEARING OFFICER KURTZLEBEN: Okay. So then for voting
14 group B, non-professional unit, can it be stipulated that any
15 unit found appropriate by the Regional Director should include
16 all full time and regular part time assistant teachers, cooks
17 and janitors employed by the Employer at its facility located
18 at 1093 Southern Boulevard, Bronx, New York and excludes all
19 other employees, including professional employees listed in
20 unit A, office clerical employees, and guards, and other
21 professional employees and supervisors, as defined in the Act?

22 MR. WEINBERGER: Yes.

23 HEARING OFFICER KURTZLEBEN: Okay. Does the Union
24 stipulate?

25 MR. MURRAY: Yes, except the Union does not stipulate that

1 office managers, family advocate -- and family advocates should
2 be excluded from the unit.

3 HEARING OFFICER KURTZLEBEN: Okay. So case 02-RC-204311.
4 We'll start first off do the parties stipulate that this
5 election should be held as a Sonotone election? Does the
6 Employer stipulate?

7 MR. WEINBERGER: Yes.

8 HEARING OFFICER KURTZLEBEN: And does the Union stip --

9 MR. MURRAY: Yes.

10 HEARING OFFICER KURTZLEBEN: Okay. And can it be
11 stipulated that a bargaining unit that for unit A, professional
12 employees, includes all full time and part time lead teachers
13 employed by the Employer at its facility located at 1778
14 Southern Boulevard, Bronx, New York and excludes all other
15 employees, including non-professional employees to be listed in
16 unit B, office clerical employees, and guards and supervisors,
17 as defined in the Act? Does the employ -- and that this is the
18 unit appropriate for purposes of collective bargaining. Does
19 the Employer stipulate?

20 MR. WEINBERGER: Yes.

21 HEARING OFFICER KURTZLEBEN: And does the Union stipulate?

22 MR. MURRAY: Yes.

23 HEARING OFFICER KURTZLEBEN: So for voting group unit B,
24 non -- the non-professional unit, can it be stipulated that any
25 unit found appropriate by the Regional Director should include

1 all full time and regular part time assistant teachers and
2 janitors employed by the Employer at its facility located at
3 1778 Southern Boulevard, Bronx, New York and should exclude all
4 other employees, including professional employees listed in
5 unit A, office clerical employees, and guards, and other
6 professional employees and supervisors, as defined in the Act?
7 Does the Employer stipulate?

8 MR. WEINBERGER: You just said assistant teachers and
9 janitors, correct?

10 MR. MURRAY: Yes.

11 HEARING OFFICER KURTZLEBEN: Yes.

12 MR. WEINBERGER: Okay, yes, the Employer would.

13 HEARING OFFICER KURTZLEBEN: Okay. And does the Union
14 stipulate?

15 MR. MURRAY: Yes, except the Union does not stipulate that
16 family advocates should not be included in the Union -- unit.

17 HEARING OFFICER KURTZLEBEN: Okay. All right. So for
18 case number 02-RC-204313, do the parties stipulate that the
19 election should be held as a Sonotone election? Does the
20 Employer stipulate?

21 MR. WEINBERGER: Yes.

22 HEARING OFFICER KURTZLEBEN: And does the Union stipulate?

23 MR. MURRAY: Yes.

24 HEARING OFFICER KURTZLEBEN: Okay. Can it be stipulated
25 that a bargaining unit that includes, for the professional

1 unit, unit A, all full time and part time lead teachers
2 employed by the Employer at its facility located at 770 St.
3 Anne's Avenue, Bronx, New York and should exclude all other
4 employees, including non-professional employees listed in unit
5 B, office clerical employees, and guards and supervisors, as
6 defined in the Act, and that this unit is appropriate for the
7 purposes of collective bargaining? Does the Employer
8 stipulate?

9 MR. WEINBERGER: Yes.

10 HEARING OFFICER KURTZLEBEN: And does the Union stipulate?

11 MR. MURRAY: Yes.

12 HEARING OFFICER KURTZLEBEN: For voting group unit B, non-
13 professional unit, can it be stipulated that any unit found
14 appropriate by the Regional Director should include all full
15 time and regular part time assistant teachers, cooks and
16 janitors employed by the Employer at its facility located at
17 770 St. Ann's Avenue, Bronx, New York and should exclude all
18 other employees, including professional employees listed in
19 unit A, office clerical employees, and guards, and other
20 professional employees and supervisor, as defined in the Act?
21 Does the Employer stipulate?

22 MR. WEINBERGER: Yes.

23 HEARING OFFICER KURTZLEBEN: And does the Union stipulate?

24 MR. MURRAY: Yes, except office managers -- the Union does
25 not agree that office managers and family advocates should be

1 excluded from the unit.

2 HEARING OFFICER KURTZLEBEN: Okay. For case number 02-RC-
3 204314 do the parties stipulate that the election should be
4 held as a Sonotone election? Does the Employer stipulate?

5 MR. WEINBERGER: Yes.

6 HEARING OFFICER KURTZLEBEN: Does the Union stipulate?

7 MR. MURRAY: Yes.

8 HEARING OFFICER KURTZLEBEN: Okay. And for unit A for the
9 professional unit, can it be stipulated that a bargaining unit
10 that includes all full time and part time lead teachers
11 employed by the Employer at its facility located at 331 East
12 150th Street, Bronx, New York and the unit that excludes all
13 other employees, including non-professional employees listed in
14 unit B, office clerical employees, and guards and supervisors,
15 as defined in the Act, is appropriate for the purposes of
16 collective bargaining? Does the Employer stipulate?

17 MR. WEINBERGER: Yes.

18 HEARING OFFICER KURTZLEBEN: And does the Union stipulate?

19 MR. MURRAY: Yes.

20 HEARING OFFICER KURTZLEBEN: For unit B, the non-
21 professional unit, can it be stipulated that any unit found
22 appropriate by the Regional Director should include all full
23 time and regular part time assistant teachers, cooks and
24 janitors employed by the Employer at its facility located at
25 331 East 150th Street, Bronx, New York and should exclude all

1 other employees, including professional employees listed in
2 unit A, office clerical employees, and guards, and other
3 professional employees and supervisors, as defined in the Act?
4 Does the Employer stipulate?

5 MR. WEINBERGER: Yes.

6 HEARING OFFICER KURTZLEBEN: And does the Union stipulate?

7 MR. MURRAY: Yes, except the Union does not stipulate that
8 office managers, school age coordinators and family advocates
9 should be excluded from the unit.

10 HEARING OFFICER KURTZLEBEN: Okay. For case number 02-RC-
11 204316 do the parties stipulate the election should be held as
12 a Sonotone election? Does the Employer stipulate?

13 MR. WEINBERGER: Yes.

14 HEARING OFFICER KURTZLEBEN: And does the Union stipulate?

15 MR. MURRAY: Yes.

16 HEARING OFFICER KURTZLEBEN: Okay. For unit A for the
17 professional unit, can it be stipulated that a bargaining unit
18 that includes all full time and part time lead teachers
19 employed by the Employer at its facility located at 2 Elliott
20 Place, Bronx, New York and excludes all other employees,
21 including non-professional employees listed in unit B, and
22 office clerical employees, and guards and supervisors, as
23 defined in the Act, is appropriate for the purposes of
24 collective bargaining? Does the Employer stipulate?

25 MR. WEINBERGER: Yes.

1 HEARING OFFICER KURTZLEBEN: And does the Union stipulate?

2 MR. MURRAY: Yes.

3 HEARING OFFICER KURTZLEBEN: Okay. For unit B, non -- the
4 non-professional unit, can it be stipulated that any unit found
5 appropriate by the Regional Director should include all full
6 time and regular part time assistant teachers and janitors
7 employed by the Employer at its facility located at 2 Elliott
8 Place, Bronx, New York and should exclude all other employees,
9 including professional employees listed in unit A, office
10 clerical employees, and guards, and other professional
11 employees and supervisors, as defined in the Act? Does the
12 Employer stipulate?

13 MR. WEINBERGER: Yes.

14 HEARING OFFICER KURTZLEBEN: Does the Union stipulate?

15 MR. MURRAY: Yes, except the Union does not stipulate that
16 office managers should be excluded from the Union.

17 HEARING OFFICER KURTZLEBEN: Okay. For case number 29-RC-
18 204367, do the parties stipulate that the election should be
19 held as a Sonotone election? Does the Employer stipulate?

20 MR. WEINBERGER: Yes.

21 HEARING OFFICER KURTZLEBEN: And does the Union stipulate?

22 MR. MURRAY: Yes.

23 HEARING OFFICER KURTZLEBEN: Okay. And for voting group
24 unit A, the professional unit, can it be stipulated that a
25 bargaining unit that includes all full time and regular part

1 time lead teachers employed by the Employer at its facility at
2 58 Belmont Avenue, Brooklyn, New York, those are the employees
3 that should be included and excluded all other employees,
4 including non-professional employees listed in unit B, and
5 office clerical employees, and guards, and other professionals
6 employees and supervisors, as defined in the Act? That that
7 unit is appropriate for purposes of collective bargaining.
8 Does the Employer stipulate?

9 MR. WEINBERGER: Yes.

10 HEARING OFFICER KURTZLEBEN: And does the Union stipulate?

11 MR. MURRAY: Yes.

12 HEARING OFFICER KURTZLEBEN: Okay. For group unit B, non-
13 professional unit, can it be stipulated that any unit found
14 appropriate by the Regional Director should include all full
15 time and regular part time assistant teachers, cooks and
16 janitors employed by the Employer at its facility at 58 Belmont
17 Avenue, Brooklyn, New York, and should exclude all other
18 employees, including professional employees listed in unit A,
19 office clerical employees, and guards and supervisors, as
20 defined in the Act. Does the Employer stipulate?

21 MR. WEINBERGER: Yes.

22 HEARING OFFICER KURTZLEBEN: And does the Union stipulate?

23 MR. MURRAY: Yes, except the Union does not stipulate that
24 office manager, school age coordinators or family advocates
25 should be excluded from the Union.

1 HEARING OFFICER KURTZLEBEN: Okay. And for case number
2 02-RC-204374 do the parties stipulate that the election should
3 be held as a Sonotone election? Does the Employer stipulate?

4 MR. WEINBERGER: Yes.

5 HEARING OFFICER KURTZLEBEN: And does the Union stipulate?

6 MR. MURRAY: Yes.

7 HEARING OFFICER KURTZLEBEN: For unit A, the professional
8 unit, can it be stipulated that a bargaining unit that includes
9 all full time and part time lead teachers employed by the
10 Employer at its facility located at 1465 Webster Avenue, Bronx,
11 New York and excludes all other employees, including non-
12 professional employees listed in unit B, and office clerical
13 employees, and guards and supervisors, as defined in the act,
14 is a appropriate -- a unit appropriate for the purposes of
15 collective bargaining? Does the Employer stipulate?

16 MR. WEINBERGER: Yes.

17 HEARING OFFICER KURTZLEBEN: And does the Union stipulate?

18 MR. MURRAY: Yes.

19 HEARING OFFICER KURTZLEBEN: And for unit B, non-
20 professional unit, can it be stipulated that any unit found
21 appropriate by the Regional Director should include all full
22 time and regular part time assistant teachers and janitors
23 employed by the Employer at its facility located at 1465
24 Webster Avenue, Bronx, New York and excludes all other
25 employees, including professional employees listed in unit A,

1 office clerical employees, and guards, and other professionals
2 employees and supervisors, as defined in the Act?

3 MR. WEINBERGER: I hate to ask you that, but could you
4 just read the first part, the included again?

5 HEARING OFFICER KURTZLEBEN: Sure.

6 MR. WEINBERGER: Sorry.

7 HEARING OFFICER KURTZLEBEN: So this is unit B, non-
8 professional unit, included is all full time and regular part
9 time assistant teachers and janitors employed by the Employer
10 at its facility located at 1465 Webster Avenue, Bronx, New
11 York.

12 MR. WEINBERGER: It's okay. Yes, we will stipulate.

13 HEARING OFFICER KURTZLEBEN: Okay. And the Union?

14 MR. MURRAY: The Union will stipulate except it does not
15 stipulate that office managers and family advocates should be
16 excluded from the Union.

17 HEARING OFFICER KURTZLEBEN: Okay. Those stipulations are
18 received. Okay. The parties are reminded that prior to the
19 closing of the hearing, the Hearing Officer will solicit the
20 parties' positions on the type, date, time and locations of the
21 election and eligibility period, including most recent payroll
22 period ending date, and any applicable eligibility formulas.
23 We will not permit litigation on those issues. The Hearing
24 Officer will also inquire as to the need for foreign language
25 ballots and foreign language notices of election.

1 MR. WEINBERGER: We're going to object to that. If we
2 don't have testimony on dates, and times and places, how are we
3 going to have this election?

4 HEARING OFFICER KURTZLEBEN: Well, we don't litigate -- we
5 don't take testimony on the issues. We just get your positions
6 on the issues.

7 MR. WEINBERGER: My understanding is that there has to be
8 some explanation or backup, otherwise what's the point of this?
9 So I'm sure that that procedure is workable or viable. I'm not
10 saying there has to be testimony, but there has to be more at
11 least to explain our position.

12 HEARING OFFICER KURTZLEBEN: Well, you can -- I'll ask
13 questions about, you know, why you need certain days --

14 MR. WEINBERGER: Fine. That's fine.

15 HEARING OFFICER KURTZLEBEN: Okay.

16 MR. WEINBERGER: That -- okay.

17 HEARING OFFICER KURTZLEBEN: Okay. The parties have been
18 advised that the hearing will continue from day to day as
19 necessary until completed, unless the Regional Director
20 concludes that extraordinary circumstances warrant otherwise.
21 The parties are also advised that upon request they shall be
22 entitled to a reasonable period at the close of the hearing for
23 oral argument. Post-hearing briefs shall be filed only upon
24 special permission by the Regional Director. In addition, a
25 party may offer into evidence a brief memo of points and

1 HEARING OFFICER KURTZLEBEN: Okay.

2 MR. WEINBERGER: Because we have evidence today. We can
3 go into examples of how this is done. We're prepared. That's
4 our offer of proof. We have plenty. We have testimony we'll
5 offer today.

6 HEARING OFFICER KURTZLEBEN: Uh-huh.

7 MR. WEINBERGER: You don't have to take my word.

8 HEARING OFFICER KURTZLEBEN: Okay.

9 MR. WEINBERGER: So your phone works there. That's good.
10 On the -- about this hiring panel. So that's it. So per se
11 they all three should be out.

12 Now, there's more. There's more criteria. And I don't
13 know how lengthy you want me to go. We can down 2(11) of the
14 Act --

15 HEARING OFFICER KURTZLEBEN: If you can --

16 MR. WEINBERGER: -- and create --

17 HEARING OFFICER KURTZLEBEN: -- go down -- can you just
18 briefly describe what -- I guess what indicia can be proved and
19 what evidence you could use to support each one?

20 MR. WEINBERGER: Okay. That's fair.

21 HEARING OFFICER KURTZLEBEN: Uh-huh.

22 MR. WEINBERGER: That's fair. On the managerial part of
23 this whole thing, again blurring lines, these people -- the
24 school age coordinator creates lesson plans and those are
25 things that are required to be followed. And as part of that,

1 Things that are found to be managerial under the Act. If
2 you want we can go through -- I can cite -- we can cite how
3 it's the same. Just as an offer of proof, managerial employees
4 -- and this is from a case -- recent case last year, where
5 defined as employees who formulate and effectuate high level
6 employer policies or have discretion in the performance of
7 their job duties, independent of the employer's established
8 policy. It's exactly what they have in this case.

9 They can create guidelines, as I said, necessary for
10 admission or termination. They do home visits. They really
11 decide who can -- you know, children to be admitted or children
12 not to be admitted or at the very least have effective
13 recommendation. They're really involved in formulating and
14 controlling lots -- I'm sorry, I dropped the pen -- lots of
15 important policies. And they also recommend and have these
16 things get carried out. So that's basically the duties.

17 HEARING OFFICER KURTZLEBEN: Okay.

18 MR. WEINBERGER: And also to give the scope of how the
19 Employer is -- they're part of, as I said, this hiring panel,
20 which consists of the top really echelon of people in this
21 administrate -- in the administration of a facility or academy.
22 And it's really the family advocate, the education -- the
23 academy director, the education director or the office manager.
24 Those are, you know, some of the important cry -- people at
25 these facilities.

1 Now, the office manager, as I said, is on the hiring
2 panel. Again, we have the same testimony we can produce today
3 if necessary. The office manager, besides being on the hiring
4 panel, has some -- both again, gets a little dicey, managerial
5 slash confidential duties. Now, the office manager sees what -
6 - sees the stuff, sees the records, sees the employees'
7 records.

8 It's this labor nexus test. It's not the only -- the idea
9 that you just have access to confidential information. It's
10 that there's some labor nexus component of it, without getting
11 into the law too much.

12 So the office manager would see things that you generally
13 don't see and would be privy to things that, you know, if the
14 academy director -- who she's involved with or he's involved
15 with, the office manager, makes decisions, does certain things.
16 Those are the things that the office manager sees. You know,
17 she has a connection to this whole process, particularly the
18 labor relations, and discipline and things like that. And
19 she's really part of the administration. So that's what we
20 have in very broad strokes.

21 HEARING OFFICER KURTZLEBEN: Okay. And the office manager
22 evidence would be presented through testimony as well?

23 MR. WEINBERGER: Yes. It's what we have.

24 HEARING OFFICER KURTZLEBEN: Okay. I'm going to go off
25 the record.

1 cannot be correct.

2 We are saying school age coordinators, office manager and
3 family advocates are not included. That is not an eligibility
4 issue. That's the scope of the unit issue. So that's wrong.

5 And I'm not clear, from what you just said respectfully,
6 whether those issues or those classifications are in dispute or
7 not. As we understand it, even under the Board's rules, they
8 would still be in dispute, maybe subject to something later.
9 But we are -- but I don't understand.

10 It does involve the scope of the unit. How do you get --
11 it's not whether -- I don't want to -- I'm trying to think of a
12 politically neutral name here. Stuart Weinberger is a
13 supervisor in a clerical unit. This goes to the very scope of
14 who's in and who's out.

15 So I don't understand this ruling at all. So we basically
16 have not decided the scope of the unit issue. It's just
17 backwards here in this case. This is not an issue that Stuart
18 Weinberger is a supervisor in the office clerical. That Stuart
19 Weinberger can vote subject to challenge. But whether a
20 specific category or categories of employees are in, how is
21 that deferred until later? Isn't that an automatic election
22 objection?

23 HEARING OFFICER KURTZLEBEN: Okay. So I've stated the
24 Regional Director's --

25 MR. WEINBERGER: So --

1 MR. WEINBERGER: This is my objection to the
2 consolidation. Each petition should be looked at on this issue
3 itself. I don't think it has been. I think I agree with Mr.
4 Murray that some are one employee, maybe two, but there are
5 some with three. And that's all I have to say within the scope
6 of my minute.

7 MR. MURRAY: That was actually 25 seconds. That's very
8 good.

9 HEARING OFFICER KURTZLEBEN: Okay. So I'm just going to
10 recap, in terms of the unit, what we have, just the unit issue.
11 So based on the stipulations, we have that including in the
12 professional unit is only the lead teachers and ex -- and that
13 the issues that were raised here today were that the Employer
14 would like to exclude the office managers --

15 MR. MURRAY: Family advocates.

16 HEARING OFFICER KURTZLEBEN: -- family advocate and school
17 age coordinators from the non-professional unit and the Union
18 would like to include the office managers, family advocates and
19 school age coordinators in the non-professional unit. Is that
20 correct?

21 MR. MURRAY: Correct.

22 MR. WEINBERGER: I -- I'm just going to say it again, that
23 goes to the -- really the unit itself. So we really haven't
24 stipulated on unit B. And that's the answer.

25 HEARING OFFICER KURTZLEBEN: So you -- so what's --

1 Murray might want to start first. Given the hour that's not
2 possible. Being as brief as possible, we've said so many
3 arguments before.

4 HEARING OFFICER KURTZLEBEN: Uh-huh.

5 MR. WEINBERGER: It's now on the record 10 after 6:00.
6 This is really not right. In fact the hearing has stretched
7 on, because we wanted to finish it today, probably longer than
8 it should have and is commonly allowed. I can give brief
9 argument.

10 We -- you know, the thing -- there are two points and I'll
11 do it briefly if you want now or Mr. Murray goes, because I
12 don't know who goes first. But we're objecting to this whole
13 process and I know we're not likely to be allowed to even sum
14 it up in brief. I don't know where we stand on that either.

15 But, you know, whatever you want we'll do now. There are
16 very serious time constraints here. So that's where we're at.

17 HEARING OFFICER KURTZLEBEN: Okay. So are you prepared to
18 give an oral argument now?

19 MR. WEINBERGER: The answer really is no. We'd rather --
20 maybe a brief statement and maybe, you know, due Monday or
21 Tuesday, where we can at least articulate what we said. So
22 that's the answer. If we have to give an oral, we'll do it.
23 Whatever the Region wants.

24 HEARING OFFICER KURTZLEBEN: Would you like a brief recess
25 now to prepare?